No. 20,444

IN THE

United States Court of Appeals

For the Ninth Circuit

J. D. MALLON and CHELLIE MALLON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' CLOSING BRIEF

BLADE & FARMER,
Post Office Drawer 111,
1849 Robinson Street,
Oroville, California 95965,
Attorneys for Appellants.

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SUMMARY OF ARGUMENT

This Court should hear and decide the appeal on the merits because literal compliance with Rule 73(a) is no longer vital to jurisdiction. The clerk delayed 14 days in giving notice of the entry of the order denying appellants' motion for new trial. Despite language to the contrary in Rule 73(a) time for appeal commences upon receipt of such notice in which case the Notice herein, filed but one day late pursuant to Rule 73(a), was nevertheless timely.

The trial court did not exercise discretion in excluding appellants' sales. Actually it declined to do so although so urged by appellants.

State v. Whitehurst, 337 F. 2d 765 cited by appellee in support of the admission and reliance by its

appraisers on two appellee sales is not in point because there a seller was deceived about an immaterial factor whereas the state of mind of the buyers in sales is material in this case. It is immaterial whether subdivision land has greater value than agricultural land since sales of subdivision land can not properly be used to value the subject property which was unanimously classified as agricultural land.

Appellants' contention that it was prejudicial error to deny their counsel's request to examine notes taken to the stand and referred to by the witness is not weakened by authorities cited by appellee for they generally apply to situations where the witness did not take his notes to the stand and refer to them during testimony as in this case.

Evidence bearing upon the relative reliability of expert witnesses is not collateral but is of direct importance where the ultimate issue turns on the opinion testimony of such witnesses. *United States v. 60.14 Acres in Warren and McKean Counties, Pa.* (not yet reported), cited by appellee, does not support its contention that judicial discretion authorized the exclusion of evidence concerning compensation of witnesses although admissible by state statute. On the contrary such case applied Rule 43(a) as a rule of admission rather than exclusion, and is in accord with appellants' contentions. Other cases cited by appellee reflect the admission or exclusion of evidence or the following of basic procedures under the well established rule that matters of substance in federal eminent domain trials are governed exclusively by federal law.

The argument of appellee concerning the striking of the opinion testimony of rebuttal witness Snelson misses the question of law involved, i.e., whether opinion evidence is permitted in rebuttal, and is confusing in quoting and referring to the record. The argument by appellee that the answer was properly stricken because it was too broad or non-responsive is without merit because there was no objection on that or any other ground. The objection was to the question solely on the ground above stated that opinion testimony on rebuttal is improper and the court struck the answer saying that it was doing so "in view of the objection." It was not necessary for appellants to object to such ruling or to cite it as error in their motion for new trial in order to urge it before this Court.

Appellants' contentions of error in the instructions are relied upon, comment upon appellee's argument that no error with respect thereto occurred being deemed necessary.

I

NOTICE OF APPEAL

A. Compliance With Time Requirements of Rule 73(a) Concerning Filing of Notice of Appeal Is No Longer Strictly Jurisdictional.

Appellee has quite properly raised the question of the timeliness of the filing of the notice of appeal and has correctly stated that the notice was not filed within 60 days after the entry of Judge Clark's Order

Denying Appellants' Motion for New Trial as provided by Rule 73(a). Appellee has further urged that such compliance is mandatory and jurisdictional. Appellants cannot agree.

28 U.S. Code Section 2107, which was the statute requiring the filing of the notice of appeal within the time therein set forth, was effectively repealed by the adoption of 28 U.S. Code Sections 2072 and 2073, which enabled the adoption of the Federal Rules as well as the Judicial Code of 1948 effective September 1, 1948, C. 646, 62 Stat. 869. By such action, Congress placed the regulation of appeals within the rule making power of the court.

On page 11 et seq. of its brief appellee urges that failure to file the Notice of Appeal on or before the sixtieth day after such Order was entered, i.e., the absence of strict compliance with Rule 73(a), mandatorily deprives this Court of jurisdiction and compels dismissal of the appeal. The authorities cited in support (pages 12 and 13) should be examined in the light of the following decisions of the Supreme Court:

Harris Lines v. Cherry Meat Packers[1] (1962) 371 U.S. 215, 9 L. ed. 2d 261, 83 S. Ct. 283;

Thompson v. Immigration and Naturalization Service[1] (1964) 375 U.S. 384, 11 L. ed. 2d 404, 84 S. Ct. 397;

Wolfsohn v. Hankin[1] (1964) 376 U.S. 203, 11 L. ed. 2d 636, 84 S. Ct. 699, reh. den. 376 U.S. 973, 12 L. ed. 2d 87, 84 S. Ct. 1133.

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[1]Cited in footnote Appellee's Brief p. 4.

Although appellee argues (p. 14) that such decisions are distinguishable, i.e., that "there was some substantial equity in favor of the appellant . . .", the basis of such argument is itself inconsistent with the contention that literal compliance with the rule is mandatory to jurisdiction of this Court.

Thus, in *Harris Lines,* supra, the extension of time allowed by the District Court based on excusable neglect due to failure to learn of the entry of the judgment, reversed by the Court of Appeals for insufficient support in the record, was reinstated by the Supreme Court, which thereupon required that the Court of Appeals hear the appeal on its merits.

In *Thompson,* a Motion for New Trial was not timely filed (two days late). Hence, the extension of time for appeal resulting from the *timely* filing of such a motion was unavailable under the rule. Nevertheless, the Supreme Court set aside the dismissal of appeal ordered by the Court of Appeals, finding the case to fit "squarely within the letter and spirit of Harris."

Finally in *Wolfsohn* in a per curiam opinion the Supreme Court set aside the dismissal ordered by the Court of Appeals where the District Court had purported to extend the time within which to file a Motion for Rehearing, although clearly no authority to extend such time was found to exist. The Supreme Court acted on the authority of *Harris* and *Thompson.*

To the same effect, see *Pierre v. Jordan* (1964, 9th Cir.) 333 F. 2d 951, 955, where the Motion was *not*

timely filed but having been heard on the merits by the trial court, was deemed timely filed by this Court in declining to dismiss the appeal.

See also *Lieberman v. Gulf Oil Corporation* (1963, 2nd Cir.) 315 F. 2d 403, cert. den. 375 U.S. 823, 11 L. ed. 2d 56, 84 S. Ct. 62, where the Court of Appeals declined to dismiss an appeal where the District Court had extended the time, on the authority of *Harris* saying that several months prior thereto it would have thought the District Court to be without authority to grant such extension. *Lieberman* was cited with approval in *Thompson*. Herein, at any time prior to May 14th the District Court could have extended the time an additional 30 days without notice pursuant to Rule 6(b). At any time after May 14th, but not more than 30 days, the Court could have extended the time for such 30 days upon noticed motion.

Conway v. Pennsylvania Greyhound Lines (D.C.C.A. 1957) 243 F. 2d 39.

Hence, the Notice was filed but one day beyond the time provided by Rule 73(a) but at a time when it could have been authorized upon application, had the matter come to the attention of counsel. It is submitted, therefore, that the circumstances set forth in the affidavit of appellants' counsel justify this Court in hearing the matter on the merits.

B. Effect of Failure on the Clerk to Notify Appellants of Entry of Order Denying Motion for New Trial.

Rule 77(d) requires the clerk immediately upon the entry of an order or a judgment to serve notice

of entry by mail upon each party who is not in default. It also provides that any party may in addition serve a notice of such entry. The final sentence of the rule provides that lack of notice of entry does not affect the time to appeal or relieve or authorize a court to relieve a party for failure to appeal within the time allowed except as permitted in Rule 73(a).

In the present case, the clerk failed to give notice to the appellants of the entry of Judge Clark's order on March 15 or immediately thereafter. This is shown by the docket entries as well as by the affidavit of appellants' counsel. Indeed, appellants' counsel received no information concerning Judge Clark's ruling until March 29th (14 days after entry thereof).

In *Hill v. Hawes,* 320 U.S. 520, 88 L. ed. 283 (1944) a judgment of dismissal was entered and the clerk failed to send notice thereof pursuant to Rule 77(d). The Court of Appeals had a 20 day rule for notice of appeal. The notice of appeal was not filed until six days after expiration thereof. Thereupon, the trial judge ordered the judgment vacated by reason of the clerk's failure to give such notice and on the same day signed and filed a second judgment. A notice of appeal therefrom was filed seven days later. The Court of Appeals granted a motion to dismiss the appeal. In urging to the Supreme Court that it should not disturb such dismissal the appellee argued that the vacation of the first judgment was an attempt to extend the time for appeal which a District Court could not do. The Supreme Court agreed that a District Court could not extend the time but held

that the clerk's failure to give the notice did affect its validity and finality, stating on page 523:

> "It is true that Rule 77(d)[2] does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule."

The judgment of dismissal was reversed.

In *Lohman v. United States* (6 Cir. 1956) 237 F. 2d 645 the Court of Appeals declined to dismiss an appeal where the Motion for New Trial was orally denied, appellants' counsel had approved the form of a written order but the clerk had failed to notify him of its entry. The court said on page 666:

> "The general rule appears to be that where there has been a failure or delay in giving notice on the part of the clerk the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of the entry of the order (authorities)."

To the same effect see *Blunt v. United States* (D.C.C.A.) 244 F. 2d 355. The courts in *Lohman* and in *Blunt* cited and relied upon *Hill*.

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[2]The final sentence in Rule 77(d) was added subsequent to this decision at the time of the amendment to Rule 73(a) in 1946. See generally 7 *Moore's Federal Practice* 3115 et seq., 4006, et seq.

In *Thompson,* supra, although the appeal was reinstated apparently because of reliance by the appellants' counsel on a statement of the District Court that a motion for new trial was timely filed, in fact, it was not filed until 12 days after entry of the judgment. Rule 59(b) requires service thereof 10 days after such entry. Hence, extension until after ruling thereon pursuant to Rule 73(a) was not available. The appellant argued that the Motion *was* timely filed because it was filed within ten days after receipt of notice of entry of judgment.

Clearly under the rule stated in *Lohman* the Notice of Appeal was timely herein being well within 60 days after receipt of a copy of the Order of Judge Clark.

There has been no motion to dismiss this appeal. The appellee has responded on the merits. Obviously, no prejudice has resulted from the one day delay in filing. Hence, it is respectfully submitted that the appeal should be heard and decided on the merits.

II

COMMENT ON RESPONSE TO SPECIFIED ERRORS

Appellants will herein confine their remarks to those items in appellee's brief deemed to be significant and will attempt to avoid reiteration of matter set forth in their Opening Brief.[3]

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[3]Omission of comment is not intended to imply agreement with or concession to any appellee statement but rather an effort to avoid undue length, consistent with advice appearing in Federal Civil Practice handbook (C.E.B. (1960) 811).

1. Exclusion of Defense Sales (Specification No. 1).

Appellee urges that in making the rulings admitting and excluding proposed sales "the trial court was exercising its discretion . . . " (U.S. Br. 19). However, it was appellants who urged the trial judge to exercise discretion with respect to remoteness of time (R.T. 51)[4] but without success.

2. Verdict Based on Two Improper Sales (Specification No. 2).

The citation of and quotation from *United States v. Whitehurst* (4th Cir., 1964) 337 F. 2d 765 (U.S. Br. 23) overlooks important factual distinctions. In the present case the state of mind of the respective *buyers* is significant. *Whitehurst* dealt with a deceived *seller*. Moreover, the seller was not deceived as to the property sold but as to the use thereafter to be made of it important to him only because of the effect on other property owned by him.

The argument that appellants were not demonstrably hurt by the use of such sales because subdivision land may sell for more than agricultural land and in this instance was not shown to sell for less is irrelevant. Surely grapes cannot be valued by reference to sales of grapefruit, regardless of which brings the higher price per pound.

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[4]Appellee's characterization of this contention before the trial court as an admission (U.S. Br. 18) thus ignores appellants' argument that the trial court refused to exercise discretion in deference to an erroneous belief in a five year rule of law (Op. Br. 16). *Cf. United States v. Featherston* (10th Cir. 1963) 325 F. 2d 539, 543, where the Commission did not exercise discretion, although authorized to do so, but "Instead, it held as a matter of law the evidence was not admissible". Reversed. Error held prejudicial. Featherston is cited by appellee (U.S. Br. 15, 38, 46).

3. Denial of Request to Examine Notes. (Specification No. 3).

Appellee cites and quotes from *Phillips v. United States* (2d Cir., 1945) 148 F. 2d 714, asserting it to be "squarely in point." (U.S. Br. 38) However, it cannot be determined from the opinion whether the witness took the appraisal report inspection of which was denied to the stand and referred to it during his examination or merely reviewed it to refresh his recollection prior to taking the stand.[5] The distinction is important, although apparently overlooked by appellee for it suggests in a footnote (U.S. Br. 39) that it is not clear that under California law that appellants were entitled to inspect such notes, citing three California cases. However, in each of these inspection was held properly denied because the witness had *not* taken the notes to the stand and consulted them during testimony but had merely reviewed them in advance thereof.[6]

The case of *Brownlow v. United States* (9th Cir. 1925) 8 F. 2d 711, cited by appellee (U.S. Br. 40) is not in point because there the portions of the notebook referred to by the witness denied to opposing counsel pertained to cases entirely different from the one being tried.

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[5]This case is also reported as *United States v. 80.46 acres in Erie County, et al.*, 59 F. Supp. 876, but no reference to the appraisal report appears in the opinion.

[6]The same factual distinction appears in the other decisions cited by appellee (U.S Br. 39, 40) *Goldman v. United States*, 316 U. S. 129, 132 (1942); *C. W. Hall Co. v. Marquette Cement Mfg. Co.*, 208 Fed. 260, 265 (C.A. 8, 1913). In *United States v. Easterday*, 57 Fed. 165, 167 (C.A. 2, 1932) whether the notes were referred to on the stand is not clear from the opinion, but reference was to matters concerning defendants not then on trial.

4. **Limitation of Cross-Examination Concerning Ethical Standards. (Specification No. 4).**

Appellee argues that such limitation was within the discretion of the trial court on a "collateral" issue which "plainly was remote." (U.S. Br. 33)

Obviously, the ultimate issue is just compensation based upon market value. But where this is determined largely, if not exclusively, upon the opinion testimony of expert witnesses, matters directly reflecting upon their relative reliability would appear to be direct, rather than collateral.[7]

5. **Limitation of Cross-Examination Concerning Compensation of Witnesses (Specification No. 5).**

Appellee cites and quotes from *United States v. 60.14 Acres in Warren and McKean Counties, Pa.* (Seibel) (C.A. 3 No. 15313, June 24, 1966, U.S. Br. 36) urging that appellants' argument would compel selection of the local rule in all situations. This is wholly at variance with appellants' statement (p. 40) that the federal constitution (and decisional law) on eminent domain would prevail on substantive matters but that otherwise the most favorable rule on admissibility would apply.

The selection of this case (*Warren*) to support appellee's argument is inappropriate for in *Warren* the court did apply Rule 43(a) in exactly the same manner as urged by appellants, as a rule of admissibility. It held the trial court to be in error in excluding evi-

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[7]Appellee also denies creating the issue of relative responsibility (U.S. Br. 33). The record was cited in Appellants' Opening Brief 33, upon which appellants will stand.

dence admissible under federal decisional law but inadmissible under the state rule.[8]

United States v. Certain Interests in Property in Borough of Brooklyn (Fort Hamilton) 326 F. 2d 109, 114 (C.A. 2 1964) cited (U.S. Br. 36) is not in point for it simply upheld the exclusion of evidence of reproduction costs less depreciation as a substantive question and hence governed by federal law only.[9] The same rule is reflected in *Westchester County Park Commission v. United States,* 143 F. 2d 693 (U.S. Br. 36).

United States v. 93.970, 360 U. S. 328 (U. S. Br. 37) is not pertinent. It did not involve the admission of evidence. The question was whether a state decisional rule (of equity which compelled an election of remedies) applied which would preclude the Government from maintaining an action to determine whether a lease had been revoked and that defendant had no compensable interest in a specific parcel of land and, if it did, then to acquire it by condemnation. This is clearly substantive.

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[8]There is irony in the fact that appellee urges that the clear language of Rules 71A(a) and 43(a) be disregarded in favor of judicial discretion while at the same time it urges a literal application of Rule 73(a) without judicial discretion (U.S. Br. 11 et seq.).

[9]But this Court approved admission of evidence of a capitalization approach to value in *United States v. Eden Park Association* (9 Cir. 1965) 350 F. 2d 933. Possibly implied by dicta therein is that a similar view would apply to evidence of reproduction less depreciation (p. 935).

6. **Striking Opinion of Snelson (Specification No. 6).**

Appellee's response to this contention not only avoids the issue of law presented but quotes the record out of context in such a manner as to create a distorted picture. In order to clarify one must examine the record for the proper sequence of events.

On direct examination and as part of appellants' rebuttal after Mr. Snelson had testified to his knowledge of livestock farming, of the Black Butte Dam area (R.T. 866) and his knowledge of the two government sale properties, Wilder-Boswell and Wolfe-Petty) (R.T. 867, 870, 873) the following question was asked:

> "Q. In your opinion, Mr. Snelson, how would this property No. 6 (Wolfe-Petty) compare with property generally in the Black Butte area based on what knowledge you have of the Black Butte Dam area."

Immediately there was interposed an objection:

> "Mr. Renda: Well Mr. Blade, I'm going to have to object to that. It's calling for Mr. Snelson's opinion. Now I have no objection to his testifying as to facts. But this is rebuttal, and I presume that you are attempting somehow to rebut something that the government witnesses said by way of fact. Now, to bring in another opinion is not rebutting fact. And I think this is completely and wholly improper rebuttal, your honor. And I would object to it." (R.T. 873-874)

After some discussion between court and counsel, defense counsel was instructed to proceed and then asked the following question:

"Q. Would you tell me, in your opinion, how does this property, either one of those properties compare for livestock operation with the property in the Black Butte Dam area?

A. The Black Butte Dam area and all of that surrounding area is far superior to anything in the Red Bluff area as far as producing feed for livestock goes." (R.T. 874-875)

It should be pointed out at this juncture that *no objection* was made by appellee's counsel to the *answer* given to the question. The argument in appellee's brief (U.S. Br. 41) that the answer was unresponsive is therefore inappropriate. It may be conceded that the injection of the additional words "anything in the Red Bluff area" went beyond the language of the question which referred to the two sales properties. However, in the course of development of the witness' knowledge of the two sales properties it was clearly evident to the court and to the jury that the answer referred primarily and essentially to the sales properties Boswell-Wilder and Wolfe-Petty which the witness was asked about and to which his answer was primarily addressed. If there was anything objectionable about the answer as being too broad or unresponsive in some respects, it was waived by the failure of government counsel to object thereto or to move to strike the answer in whole or in part.

Cross-examination then commenced as follows:

"Q. Well, Mr. Snelson, what do you mean by 'Black Butte area?' Are you familiar with the Whyler property, not Wilder?"

However, before the witness had an opportunity to answer either of such two questions the court said as follows:

> "The Court: I think in view of the objection that I'll strike his last answer. The jury will disregard it." (R.T. 875)

The answer so stricken was "his last answer" being the opinion comparing the Black Butte Dam area and the two properties referred to as "anything in the Red Bluff area". In stating: "in view of the objection" it is clear that the court struck the answer and instructed the jury to disregard it, *not because it was unresponsive but solely by reason of the objection above quoted, to wit, that it constituted an opinion and was improper on rebuttal.*

Although appellants' brief addressed itself to the question of law posed by the objection and the action of the court thereon, to wit, whether opinion testimony may be introduced in rebuttal, appellee in its brief, has wholly ignored such question. Certain sentences in this portion of appellee's brief are incorrect or irrelevant. Thus, on page 41 (U.S. Br.) it is said that the "comparability of the two *areas* as such and anything in the Red Bluff area was not inquired into by the Government in presenting its case." This statement certainly is inconsistent with the presentation of the two sale properties as being most nearly comparable to the subject property upon which Black Butte is located (R.T. 457, 458, 701, 705, 715, 765, 766, 788). The statement (U.S. Br. 41) that appellants did not object to the striking of the answer and that

appellants excused Snelson without soliciting a responsive answer certainly avoids the issue.

Finally, appellee argues that the specification of error is not properly before this Court because not included in the several grounds urged in support of appellants' motion for a new trial. However, a motion for a new trial is not prerequisite to appeal.

United States v. Hayashi (9 Cir. 1960) 282 F. 2d 599, 601;

Morgan Electric Co. v. Neill (9 Cir. 1952) 198 F. 2d 119;

Woods v. National Life and Accident Ins. Co. (3rd Cir. 1965) 347 F. 2d 760, 763-764.

Hence, the omission of this item from grounds urged in the motion for new trial is immaterial. The cases cited by appellee in support of this contention (U.S. Br. 42) do not support it. In *United States v. Benning,* 330 F. 2d 527, 535 (C.A. 9, 1964) the commissioners had rendered a report. The appellant had an opportunity but failed to object to the entire report. This appears to be tantamount to raising an objection to an issue for the first time on appeal. It is the appellee who on appeal raises for the first time a question as to whether Snelson's answer was responsive. Appellants presented their position in the trial court by asking the question and urging to the court the propriety thereof (R.T. 874). The action of the court was simply a ruling, although belated, in favor of the objection. Nothing further on the part of appellants is required (Rule 46). The same criticism may be made of *Pehrson v. C. B. Lauch Construction*

Co., 237 F. 2d 269, 270-271 (C.A. 9, 1956) (U.S. Br. 42) where there was no objection to a question and no specification in a motion for a new trial so that the complaint was made for the first time on appeal.

The statement (U.S. Br. 42) that "appellants had full opportunity without objection to explore with Snelson on rebuttal his opinion that the Wilder-Boswell and Wolfe-Petty *sales*—not areas—were not comparable to Tract 104" is contrary to the record.

7. **Failure to Give Instruction and Comment Upon Sales and Opinion Evidence (Specification No. 7).**

Appellee's argument concerning all of the instructions is purely argumentative and requires no further comment except to disagree and rely upon the contentions made in Appellants' Opening Brief.

CONCLUSION

For the reasons advanced in their Opening Brief and above, appellants respectfully urge that the verdict be set aside and a new trial awarded.

Dated, Oroville, California,
December 3, 1966.

Respectfully submitted,
BLADE & FARMER,
By ROBERT V. BLADE,
Attorneys for Appellants.